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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1983

DAVID LEON CHEADLE,
Petitioner

83-6141

v.

THE STATE OF NEW MEXICO,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE NEW MEXICO SUPREME COURT
AND MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

J. THOMAS SULLIVAN
Appellate Defender
New Mexico Public Defender Department
Member, USSCt Bar
215 W. San Francisco Street
Santa Fe, New Mexico 87501
(505)827-3905

ATTORNEY FOR THE PETITIONER

QUESTIONS PRESENTED FOR REVIEW

I. Whether the New Mexico Supreme Court violated Petitioner's right to due process of law and to appeal in failing to decide his issue on appeal challenging sufficiency of the evidence offered in support of the aggravating circumstance charged, murder of a witness?

II. Whether the New Mexico death penalty statute is constitutionally infirm in failing to set appropriate standards for the jury's consideration when the applicable Uniform Jury Instruction adopted by the Supreme Court permits the jury to consider "the defendant and the crime" in arriving at its decision on whether the death penalty should be imposed, where the evidence permits the jury to consider such factors as the race and religious belief of the accused and his victim in arriving at its decision?

III. Whether the New Mexico capital sentencing statute is violative of due process of law in faling to provide that the State must carry the burden of proof that death is an appropriate punishment where the statutory scheme requires the jury to weigh the aggravating and mitigating circumstances in arriving at its sentencing decision?

IV. Whether New Mexico's statutory provision for granting immunity to witnesses in criminal proceedings violates Fifth and Sixth Amendment protections where the State only is granted the power to extend a grant of immunity to a witness and no concomitant right is accorded to the accused?

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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1983

DAVID LEON CHEADLE,
Petitioner

v. CAUSE NO._____

THE STATE OF NEW MEXICO,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE NEW MEXICO SUPREME COURT

TO THE HONORABLE UNITED STATES SUPREME COURT:

Petitioner, DAVID LEON CHEADLE, by and through his attorney of record, J. THOMAS SULLIVAN, Appellate Defender, New Mexico Public Defender Department, petitions this Honorable Court to grant its writ to review the judgment of the New Mexico Supreme Court affirming his conviction and sentence of death. Petitioner asserts that the conviction and sentence of death should be reversed because of violations of federal constitutional rights and error on the part of the court below in affirming his conviction and sentence of death for capital murder.

OPINION BELOW

The opinion issued by the New Mexico Supreme Court is attached hereto as Exhibit A. A copy of Petitioner's motion for rehearing in that court is attached as Exhibit B. The court's order denying rehearing is attached as Exhibit C.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to Title 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner relies on the following amendments to the United States Constitution in support of his claim, cited in pertinent part:

> V. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...."
>
> VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."
>
> VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
>
> XIV. "...No State shall make of enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Petitioner relies on the following New Mexico statutes in support of his claim, cited in pertinent part by statutory section:

> 31-20A-1. A. At the conclusion of all capital felony cases heard by jury, and after proper charge from the court and argument of counsel, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment.
> ...
>
> B. Upon a verict by the jury or judge that the defendant is guilty of a capital felony, or upon a plea of guilty to a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized herein. In a jury trial, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge before the original trial jury....
>
> C. In the sentencing proceeding, all evidence admitted at the

trial shall be considered and additional evidence may be presented as to the circumstances of the crime and as to any aggravating or mitigating circumstances pursuant to Sections 6 [31-20A-5 NMSA 1978] and 7 [31-20A-6 NMSA 1978] of this act.

D. In a jury sentencing proceeding, the judge shall give appropriate instructions and allow argument and the jury shall retire to determine the punishment to be imposed....

31-20A-2. A. Capital sentencing deliberations shall be guided by the following considerations:
(1) whether aggravating circumstances exist as enumerated in Section 6 [31-20A-5 NMSA 1978] of this act;
(2) whether mitigating circumstances exist as enumerated in Section 7 [31-20A-6 NMSA 1978] of this act;
(3) whether other mitigating circumstances exist.

B. After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, the jury or judge shall determine whether the defendant should be sentenced to death or life imprisonment.

31-20A-4. A. The judgment of conviction and sentence of death shall be automatically reviewed by the supreme court of the state of New Mexico.

...

C. The death penalty shall not be imposed if:
(1) the evidence does not support the finding of a statutory aggravating circumstance;
(2) the evidence supports a finding thatthe mitigating circumstances outweigh the aggravating circumstances;
(3) the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; or
(4) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

31-20A-5. The aggravating circumstances to be considered by the sentencing court or jury pursuant to the provisions of Section 31-20A-2 NMSA 1978 are limited to the following:
...
B. the murder was committed with intent to kill in the commission of or attempt to commit kidnaping, criminal sexual contact of a minor or criminal sexual penetration;
...
G. the capital felony was murder of a witness to a crime or any person likely to become a witness to a crime, for the purpose of preventing report of the crime or testimony in any criminal proceeding, or for retaliation for the victim having testified in any criminal proceeding.

Petitioner also relies upon the following New Mexico Uniform Jury Instructions, set out in pertinent part as given in his case:

UJI Crim. 39.31. "The law provides that you cannot sentence the defendant to death unless you are satisfied beyond a reasonable doubt that the murder was committed under one or more of the aggravating circumstances charged. The burden is always on the state to prove beyond a reasonable doubt that the murder was committed under one or more of the aggravating circumstances charged and that the mitigating circumstances do not outweigh

the aggravating circumstances.

It is not required that the state prove this beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life.

UJI Crim. 39.33. If you have unanimously agreed on a finding that one or more of the aggravating circumstances charged were present, you must then consider the penalty to be imposed in this case. In determining the penalty to be imposed, you must consider all of the evidence admitted during this sentencing proceeding and the evidence admitted during the trial in which the defendant was found guilty of murder. You must then consider whether there are any mitigating circumstances.

If you find there are mitigating circumstances, you must then weigh the mitigating circumstances against one or more aggravating circumstances you have found in this case. After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, you shall determine whether the defendant should be sentenced to death or life imprisonment.

If you fail to unanimously agree that the death penalty should be imposed, a penalty of life imprisonment will be imposed by the court.

Petitioner finally notes that his claim for relief also involve the construction given Rule 58, New Mexico Rules of Criminal Procedur which provides:

(a) Issuance of order. If a person has been or may be called to testify or to produce a record, document, or other object in an official proceeding conducted under the authority of a court or grand jury, the district court for the judicial district in which the official proceeding is or may be held may, upon the written application of the prosecuting attorney, issue a written order requiring the person to testify or to produce the record, document, or other object notwithstanding his privilege against self-incrimination.

(b) Application. The court may grant the application and issue a written order pursuant to this rule if it finds: (1) the testimony, or the record, document, or other object may be necessary to the public interest; and (2) the person has refused or is likely to refuse to testify or to produce the record, document, or other object on the basis of his privilege against self-incrimination.

STATEMENT OF THE CASE

Summary of Material Facts

Petitioner relies on the opinion of the New Mexico Supreme Court with respect to the recitation of the facts in this case. Briefly, the facts adduced at trial showed the following: In the early morning hours of September 10, 1981, complainant Leslie Goodwin and the deceased, Gabe Nava, left a bar in Albuquerque and were confronted by Petitioner, who was armed with a handgun. At Petitioner's direction and as a result of his threat to kill them, the two walked a short distance to a place between buildings where they were ordered to face one wall in "spread eagle" position. Thereupon, Petitioner robbed both of money before ordering them to walk further down the alley. When they finished walking, Petitioner again ordered both into the "spread eagle" position, shot the deceased and ordered Goodwin to remove her clothes, threatening death to gain compliance. Petitioner then attempted to rape Goodwin but was unsuccessful at gaining an erection. Thereafter, Petitioner shot the deceased a second time, ordered Goodwin to the deceased's car and as he entered the vehicle and unlocked the door for her, she fled and reported the incident to a police patrolman after flagging him down. Nava died from the gunshot wounds later that morning.

The appeal

Petitioner brought his appeal from conviction for capital murder with sentence of death imposed and other offenses arising from the September 10, 1981 shooting of Gabe Nava and kidnapping and attempted criminal sexual penetration of Leslie Goodwin. Under New Mexico law, Petitioner was statutorily entitled to automatic review of the judgment and sentence of the trial court since the death penalty was assessed. All four issues raised by this petition were briefed and argued before the New Mexico Supreme Court, although two constitute attacks on the jury instructions which were actually given in this case and were raised as subpoints under a single point of error in the brief to that court.

The opinion of the New Mexico Supreme Court

In affirming Petitioner's convictions and sentence of death, the New Mexico Supreme Court rejected all contentions raised on appeal which are now raised in this petition. First, in paragraph IV of its opinion, the court held that Petitioner's claim of insufficiency of evidence supporting the jury's finding that he murdered Nava to keep him from being a witness to the crime constituted an attack on jury instructions which could not be raised for the first time on appeal. The court then noted that even if Petitioner were correct in his argument, a finding of evidentiary insufficiency would not require reversal of the death sentence and remand for new sentencing hearing, relying on this Court's recent decision in Zant v. Stephens, 103 S.Ct. 2733 (1983). Petitioner's motion for rehearing, specifically requesting the court review the contention on the merits and as raised, resulted in denial.

Second, the court rejected both attacks on the New Mexico death penalty statute which concerned the lack of direction given the jury on the two matters raised by this petition. The court held that the arguments were essentially waived by trial counsel's failure to object to the instructions at trial. Moreover, the court relied on Zant to note that a state is not constitutionally required to adopt specific standards for the weighing process to be engaged in by the jury in determining whether death is the appropriate sentence to be imposed. Although Petitioner had expressly objected to the vagueness of the phrase "the defendant and the crime" as a factor to be considered by the jury in setting punishment, the opinion of the court below does not expressly deal with the claim made that this phrase may allow the jury to consider non-statutory aggravating circumstances, as precluded by Section 31-20A-5, N.M.S.A. (1981 Repl.Pamp.).

Finally, in reviewing Petitioner's due process contention concerning the power of a prosecutor to seek an order of immunity

when no equivalent right exists for the accused, the court below held that the rule conferring this power on the State did not provide any right for the accused to seek a grant of immunity for a defense witness; that defense counsel failed to comply with the procedural requirements of the rule which require that the request for immunity must be made in writing; and that the evidence which Petitioner sough to produce by the proposed grant of immunity would not have been material and exculpatory in light of his alibi defense.

REASONS FOR GRANTING THE WRIT

I.

Petitioner first contends that the New Mexico Supreme Court incorrectly disposed of his sufficiency issue by characterizing it as an attack on jury instructions which could not be raised for the first time on appeal. In fact, the issue related to the sufficiency of evidence supporting the jury's finding that Petitioner killed Nava to prevent him from becoming a witness against him. Under New Mexico law, sufficiency of the evidence is a matter which can be raised for the first time on appeal because it is characterized as fundamental error. State v. Doe, 92 N.M. 100, 583 P.2d 464 (1978).

In his motion for rehearing, Petitioner expressly requested the court to consider and rule on his contention that the evidence failed to show that he had shot the deceased to prevent him from serving as a witness to the offense. The court denied the motion without commenting on the merits of his argument.

Petitioner now contends that the New Mexico Supreme Court has committed constitutional error in two respects: first, its opinion has deprived him of appellate review of his evidentiary sufficiency claim, which he based on this Court's holdings in Jackson v. Virginia, 443 U.S. 307 (1979); In re Winship, 397 U.S. 358 (1970) and in the New Mexico Court of Appeals case adopting Jackson, State v. Carter, 93 N.M. 500, 601 P.2d 733 (Ct. App. 1979); and second, the Court has misconstrued Zant v. Stephens as dispositive of the proper recourse when an aggravating circumstance is found to be unsupported by sufficient evidence at trial. With respect to the first point, Petitioner's right to have evidentiary sufficiency claims reviewed on their merits on appeal is well-established by the prior decision in Jackson, supra, and also the decisions rendered in Burks v. United States, 437 U.S. 1 (1978) and Greene v. Massey, 437 U.S. 19 (1978).

Second, the New Mexico Supreme Court denied review in construing the decision in Zant v. Stephens to mean that a finding of evidentiary insufficiency as to one of the two aggravating circumstances charged would not affect the sentence of death imposed. In Zant this Court held that where a statutory aggravating circumstance relied upon by the state is subsequently disapproved, a sentence of death would not necessarily be vacated when the sentencing jury had found an additional, proper aggravating circumstance. There, the finding of one statutory aggravating circumstance charged was sufficient to permit the jury, under Georgia's death penalty sentencing statute to return a sentencing verdict of death. Thus, the fact that one statutory aggravating circumstance fell through judicial decision did not require reversal of the sentence of death since the other relied on by the jury remained affirmed.

The New Mexico Supreme Court erred in concluding that Zant v. Stephens announced a rule that a finding of insufficiency as to an aggravating circumstance charged would not require reversal and remand for a new sentencing proceeding. In fact, the Court there distinguished Georgia's capital sentencing scheme in which aggravating circumstances serve merely to limit the class of convicted murderers who may be subjected to death as a punishment from those state statutes which require the jury or trial court to engage in a weighing of aggravating and mitigating circumstances in arriving at the sentencing decision. 103 S.Ct. at 2741. In footnote 12 of the opinion, especially, the Court notes this distinction:

> "See e.g. Williams v. State, 274 Ark. 9, 621 S.W.2d 686, 687 (Ark. 1981); State v. Irwin, 304 N.C. 93, 282 S.E.2d 439, 448-449 (NC 1981); State v. Moore, 614 S.W.2d 348, 351-352 (Tenn. 1981); Hopkinson v. State, 632 P.2d 79, 90, n. 1, 171-172 (Wyo. 1981). In each of these cases, the state supreme court set aside a death sentence based on both valid and invalid aggravating circumstances. Respondent advances these cases in support of his contention that a similar result is required here. However, examination of the relevant state statutes shows that in each of these States, not only must the jury find at least one aggravating circumstance in order to have the power to impose the death sentence; in addition, the law requires the jury to weigh the aggravating circumstances against the mitigating circumstances when it

decides whether or not the death penalty should be imposed." The New Mexico statute, Section 31-20A-2, N.M.S.A. (1981 Repl.Pamp.), similarly requires the jury to weigh the aggravating and mitigating circumstances in arriving at its sentence. This directive also appears in the Uniform Jury Instruction adopted to implement the statute, which provides in appropriate part, as given:

> "If you have unanimously agreed on a finding that one or more of the aggravating circumstances charged were present, you must consider the penalty to be imposed in this case. In determining the penalty to be imposed, you must consider all of the evidence admitted during this sentencing proceeding and the evidence admitted during the trial in which the defendant was found guilty of murder. You must then consider whether there are any mitigating circumstances.
>
> "If you find there are mitigating circumstances, you must then weigh the mitigating circumstances against one or more aggravating circumstances you have found in this case. After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, you shall determine whether the defendant should be sentenced to death or life imprisonment.
>
> "If you fail to unanimously agree that the death penalty should be imposed, a penalty of life imprisonment will be imposed by the court."

N.M.U.J.I. Crim. 39.33 (emphasis added); R. at 284.

Moreover, N.M.U.J.I. Crim. 39.31 specifically provides that the sentence of death cannot be imposed unless the State carries its burden of showing that the "mitigating circumstances do not outweigh the aggravating circumstances." This instruction was given in Petitioner's case. R, at 282. Thus, the weighing process which distinguishes the Georgia statute from those noted by this Court in footnote 12 of the Zant decision is also characteristic of the New Mexico death penalty sentencing procedure.

Because New Mexico capital juries are charged to weigh aggravating and mitigating circumstances and because the State must prove that the mitigating circumstances to not outweigh the aggravating circumstances in order to sustain a sentence of death, Petitioner's right to review was compromised by the mischaracterization of his point of error by the New Mexico Supreme Court on appeal. In light of the distinguishing features of the New Mexico statute, when compared with the Georgia statute reviewed in Zant v. Stephens, a deci-

sion on the merits of his claim of insufficient evidence supporting one of the aggravating circumstances charged is constitutionally mandated. A finding of evidentiary insufficiency would necessarily require that Petitioner be accorded a new sentencing hearing since the court below could not conclude that the jury would have imposed the same sentence without its finding that Petitioner committed murder under both of the circumstances charged as aggravating circumstances in his case.

Petitioner notes that the question of whether a death sentence arrived at by the weighing process must be reversed when one of the aggravating circumstances is subsequently invalidated—or where insufficiency of evidence requires reversal of the jury finding on one aggravating circumstance—has been expressly left open by the Court's decision in Zant v. Stephens, 103 S.Ct. at 2750; see also Gregg v. Georgia, 428 U.S. 153, 196-197 (1976).

II.

Petitioner next attacks the implementation of the New Mexico death penalty statute through the Uniform Jury Instructions given at trial. Petitioner contends that the jury instruction which requires the jury consider "the defendant and the crime" in addition to weighing aggravating and mitigating circumstances is constitutionally infirm in failing to appropriate standards for deliberation and in authorizing the jury to consider both non-statutory aggravating circumstances and constitutionally impermissible factors in arriving at its decision. At the outset, Petitioner concedes that the New Mexico Supreme Court held that the issue addressed here was deemed waived by failure to object to the instructions, as given, at trial. However, Petitioner notes that the court went on to dispose of the contentions made on appeal on their merits, holding that the Court's opinion in Zant v. Stephens rejected the contention that the constitution required adoption of specific standards to guide the jury in its deliberations. Petitioner also suggests that the court erred in applying a rule of waiver where the attack essentially went not to the specific language or applicability of the instructions given, but to the constitutionality of the statute upon which the instructions were predicated. Under New Mexico law, a question of constitutionality of a statute may be raised on appeal for the first time as jurisdictional error. State v. Austin, 80 N.M. 748, 461 P.2d 230 (Ct. App. 1969). Consequently, since the substantive basis of his attack is the unconstitutionally of the New Mexico death penalty statute, Petitioner's point is preserved for review in this Court, particularly since the New Mexico court relied on Zant v. Stephens for its holding that Petitioner's point was incorrect on the merits:

> "[T]he Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances...."

(Slip opinion, at 10; 103 S.Ct. at 2750; emphasis in original).

The instruction that the jury is to consider "the defendant and the crime" in arriving at its sentencing decision is unconstitutionally vague and deprives an accused of due process of law for two significant reasons. First, as argued in Petitioner's brief to the New Mexico Supreme Court, neither the statute nor the Uniform Jury Instruction on point limit the jury's consideration of factors which might be properly characterized under the topic: "the defendant and the crime" to factors suggesting mitigation of the punishment to be imposed. While this Court in Zant held that the sentence of death should be imposed only if appropriate in light of the "character of the individual and the circumstances of the crime," 103 S.Ct. at 2744, New Mexico has provided that the only aggravating circumstances which may be considered by the jury are those set out by statute. Section 31-20A-5, N.M.S.A. (1981 Repl.Pamp.).

The ambiguity of the phrase and the lack of direction given the jury for its proper consideration, however, permit a jury to consider non-statutory factors as "aggravating circumstances" in arriving at the decision whether or not to impose death as punishment. As counsel for appeal in his direct appeal argued before the New Mexico Supreme Court, the vagueness and lack of direction contained in the instruction would have even permitted the trial jury to consider constitutionally impermissible factors in imposing death. For instance, the evidence in this case demonstrates that Petitioner is a black male who expressed belief in the Devil, as opposed to God, while his victims were a prominent Hispanic male who wore a crucifix and an Anglo female. Following the reasoning of the plurality in Furman v. Georgia, 408 U.S. 238 (1972)(especially opinion of Douglas, J.), a sentence of death based on any of these factors—race or ethnicity, religious belief or gender—of the perpetrator would be constitutionally improper. Petitioner suggests an equally improper consideration for the jury would be the race or ethnic background, religious belief or gender of the victim as factors in determining whether the accused should be sentenced to death for the crime. Never-

theless, the ambiguity of the phrase and lack of supporting directive to the jury for its use in making the determination inherently render jury verdicts in cases where these types of facts are matters of evidence suspect. Petitioner's sentence in this case may well have been sentenced to death in this case because he was an irreverent black male who killed a Hispanic male and attempted to rape an Anglo female, irrespective of whether the offense itself merited such a sentence. Consideration of the "defendant" and the "crime" lends itself to execution of those who are unpopular, socially stigmatized or members of the most persecuted of society's minority groups. For that reason, the unbridled discretion of the jury in relying on these factors in making a capital sentencing decision is violative of due process of law. U.S. Const., amends. V and VIII.

Finally, in holding that Petitioner had essentially waived his point of error in failing to attack the instructions at the trial court level, Petitioner would suggest that the New Mexico Supreme Court does some disservice to counsel by the implication that these issues had previously been disposed of by the decision in State v. Garcia, 99 N.M. 771, 664 P.2d 969 (1983), cert. denied, ___U.S.___, 103 S.Ct. 2464. Petitioner went to trial prior to the decision being rendered in Garcia and, thus, had no notice that the court had disposed of his attacks in that case. Moreover, Petitioner's brief to the New Mexico Supreme Court was itself filed before the court reached its decision in Garcia, the first case to interpret the New Mexico death penalty statute. Traditionally, a number of New Mexico cases had recognized that challenges to jury instructions may be made for the first time on appeal and without objection at the trial level. Petitioner relied on these decisions in support of his argument in the court below; with the opinion in Garcia, however, the court held that the instructions were correct, ruling on the merits while noting waiver of the issue by failure to object at trial. Since the objections are based on constitutional attack aimed at the statute and its implementation in practice through the use of mandatory, uniform

jury instructions, Petitioner believes the court has essentially limited his right to appeal based on unconstitutionality of the death penalty statute through application of the doctrine of waiver.[1]

---

[1] The cases cited by Petitioner in his brief in chief to the New Mexico Supreme Court which have held that attacks on jury instructions may be raised for the first time on appeal include: State v. Wise, 95 N.M. 265, 620 P.2d 1290 (1980); State v. DeSantos, 89 N.M. 458, 553 P.2d 1265 (1976); and State v. Buhr, 82 N.M. 371, 482 P.2d 74 (Ct. App. 1971). Petitioner's counsel also suggested that the need for review of the instructions was constitutionally justified by the "need for reliability" in imposing sentences of death, enunciated by the Court in Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

III.

Petitioner also attacks the failure of the New Mexico death penalty statute and the promulgated jury instructions to prescribe a burden of proof requiring the State to prove that death was the appropriate sentence to be assessed beyond a reasonable doubt. The statute does provide that punishment of death cannot be imposed if the State fails to prove beyond a reasonable doubt that the "mitigating circumstances do not outweigh the aggravating circumstances." N.M.U.J.I. Crim. 39.31. The problem with this standard is that it involves proof of a negative proposition and wholly fails to guide the jury once the prescribed standard has been met by the State. Thus, if the evidence relating to aggravating and mitigating circumstances leaves the jury with a collective belief that the two balance out, no sentencing guideline suggests how the jury is to resolve the problem. In the New Mexico Supreme Court, counsel for Petitioner argued that the only acceptable standard is that aggravation must outweigh mitigation beyond a reasonable doubt if the jury is to assess the penalty of death.

The New Mexico Supreme Court relied on Zant v. Stephens in concluding that no additional sentencing guidelines are constitutionally required under the New Mexico statute. Since New Mexico has adopted a weighing approach to jury deliberation of aggravating and mitigating circumstances, Petitioner believes reliance on Zant v. Stephens is misplaced. Clearly, in Zant this Court held that the Georgia sentencing procedure is constitutionally permissible in light of the Court's previous holding that the Georgia statute passes constitutional muster in Gregg v. Georgia, 428 U.S. 153 (1976). The Georgia statute, in contrast to the New Mexico statute, uses aggravating circumstances as a means of narrowing the potential class of persons who may be liable for a sentence of death and does not provide that these circumstances are to be weighed against any mitigating circumstances developed through the evidence in arriving at the sentence.

This Court, in Zant, did note that the constitution does not require the states to adopt specific standards for the consideration of aggravating and mitigating circumstances, as the New Mexico Supreme Court noted in disposing of the argument. 103 S.Ct. at 2750. However, Petitioner believes the court below misconstrued the meaning of the passage quoted to suggest that under any system of aggravation and mitigation the constitution requires no particular action in guiding the discretion of the jury. In fact, the quoted passage suggests another interpretation—that no state is required to impose a statutory system of weighing aggravating against mitigating circumstances in the capital sentencing process adopted. Georgia obviously did not and its statute was deemed constitutionally acceptable on review. New Mexico has chosen to adopt the weighing approach, however, in contrast to the approaches taken by Georgia, and by Texas. See 103 S.Ct. at 2742, fn. 13, for example.

In adopting a weighing approach, Petitioner contends that New Mexico is required to establish either by statute or by uniform instruction a correct burden of proof upon the state when it seeks to impose the death penalty. Because the full protections of the Fifth Amendment are implemented in capital sentencing decisions, Bullington v. Missouri, 451 U.S. 430 (1981), Petitioner contends that the proper standard of proof should be applicable to those proceedings In Bullington, this Court held that because Missouri had chosen to adopt a sentencing procedure whereby the state bore some burden of proof, failure of proof could be found in a jury's verdict of life imprisonment amounting to a bar to further potential imposition of death as a punishment after grant of new trial on appeal. Interesting ly, the Missouri statute, while predicated on a burden of proof assigned by statute to the state, did not feature a standard of proof beyond a reasonable doubt as requisite to a finding that death was the appropriate sentence to be imposed. State v. Bolder, 635 S.W.2d 673, 683-684 (Mo. 1982). The issue raised by Petitioner was not reviewed by the Court in its consideration of the Missouri statute

under scrutiny in Bullington. Consequently, Petitioner asserts that Bullington provides a starting point for the analysis of what burden should be borne by the state in a capital sentencing proceeding, and not a final decision.

New Mexico currently requires the state to meet a limited burde of proof in capital sentencing proceedings since no death sentence can be imposed unless the proof shows beyond a reasonable doubt that the mitigating circumstances do not outweigh the aggravating circumstances. Petitioner finds support for his argument in the decision of the Utah Supreme Court in State v. Wood, 648 P.2d 71 (1982) in which the court held that the burden of proof in a capital sentencing proceeding is that the evidence show beyond a reasonable doubt that death is both justified and appropriate in the circumstances of the case. The New Mexico statute and jury instructions fall far short of this standard. If capital sentencing decisions are to be accorded the full protections of the Double Jeopardy Clause, as the Court suggested in Bullington, then the jury decisions which bar subsequent higher punishment on new trial must rest on an appropriate constitutional standard. That standard is the same as that imposed in all cases on the guilt/innocence determination—proof beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979).

Petitioner suggests that this is a proper case in which the Court should review the appropriate standard or burden of proof which must be imposed when a state adopts a weighing approach to aggravatin and mitigating circumstances in capital sentencing proceedings.

IV.

Petitioner finally attacks the New Mexico Rule of Criminal Procedure which extends to the State the right to seek immunity to compel testimony from a reluctant witness relying on the Fifth Amendment, but deprives an accused of a similar right. The grant of this substantive right to the prosecution only violates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. In essence, the State is able to use this power to compel testimony highly detrimental to the accused, who here was denied the opportunity to use the immunity device to produce additional testimony in support of his alibi defense.

The New Mexico Supreme Court, in reviewing the point of error raised on direct appeal, ruled that the substantive rights of Petitioner had not been violated for three reasons: first, the court held that the right to seek an order of immunity simply was not extended to Petitioner by the applicable rule; second, that Petitioner had failed to follow the correct procedure in seeking the order; and third, that the evidence which Petitioner sought was not clearly exculpatory and essential to the defense. Petitioner submits that all three reasons advanced by the court below are constitutionally inadequate to justify promulgation and application of such a biased rule of procedure in a criminal trial, particularly when the penalty to be imposed is potentially death.

First, while the court is correct in holding that the rule does not extend to the accused the right to seek an immunity order, it is the New Mexico Supreme Court's own rule of procedure which precludes defensive use of the immunity power. The court noted:

> "Since there is no constitutional provision or statute in this State allowing application for the granting of immunity to defense witnesses, we must follow the rule of criminal procedure set forth above. [Rule 58, Rules of Criminal Procedure]."

(Slip opinion, at 7). The rule, however, was promulgated by the court and its conclusion that it is bound by the terms of the rule it created begs the federal question raised below: whether the

rule, inequitable in terms of availability of the remedy provided, violates an accused's Fifth and Sixth Amendment rights to due process of law and confrontation/compulsory process, when the defense and prosecution powers are compared. For the court below to conclude that it is bound in its interpretation of these federal constitutional concerns by its prior enactment of a rule granting the substantive power to seek immunity to compel testimony to the state only reflects an insensitivity to construe state statutes and rules of procedure consistently with the guarantees of the United States Constitution.

Similarly, the court's concern with failure of Petitioner's counsel below to comply with the procedure requisites of the rule misses the point, as well. Compliance with the procedures would have been futile, according to the court's holding, since an immunity order could not be granted by the trial court on application by the defense in any event.

Finally, the court's finding that the evidence was neither clearly exculpatory nor essential to the defense is predicated on its reading of Petitioner's authority in the court below, Government of Virgin Islands v. Smith, 615 F.2d 964 (3rd Cir. 1980). There, the Third Circuit held that in certain limited circumstances, an accused in a federal prosecution may be entitled to have the trial court order the government to grant immunity to a defense witness. One of the requirements imposed by the Third Circuit is that the evidence be "clearly exculpatory" and "essential" to the defense. Petitioner relies on Government of Virgin Islands v. Smith because it represents a recognition of the problems faced by defendants who do not have the power to compel testimony over an assertion of Fifth Amendment protections. However, Petitioner notes that the thrust of his argument in the Court below was not that the New Mexico Supreme Court should adopt the Third Circuit approach in this case, but that the provisions relating to applications for immunity orders be made applicable to all parties, equally, as the Committee Commentary to Rule 58 (1981 Supp.) had suggested.

Rule 58 does not require that the evidence sought under the State's application for an immunity order be "clearly inculpatory" and "essential" to the State's case. Rather, it merely requires a showing that the evidence sought be "necessary to the public interest" and that the person for whom the immunity order is sought is likely to refuse to give the evidence absent the order. Making the same requirements applicable to defense application for an immunity order, the only showing required of Petitioner should have been that the evidence was necessary, rather than essential and clearly exculpatory, to his defense. Under New Mexico case law, however, it is clear that no power to grant an accused's application for an order of immunity is extended to the trial court, irrespective of what degree of materiality might be shown by the defense.

Petitioner's right to compulsory process and due process of law were abridged by the application of Rule 58, particularly in light of the fact that the State was able to offer damaging testimony through another witness by use of plea negotiations, a tool uniquely available to the State. See State ex rel. Plant v. Sceresse, 84 N.M. 312, 502 P.2d 1002 (1972). This witness, John Thomas Young, testified as a result of a negotiated plea agreement which included dismissal of one charge, guarantee of a probated sentence on another and agreement that the State would not prosecute the witness as an habitual offender. Young's testimony was that Petitioner had admitted shooting the victim, had told Young that he shot the victim to keep him from identifying him and that shooting the victim "felt excellent."

Petitioner sought to develop his alibi by confirming through another witness, John Archie (known as "Jay Baby"), that he had spent the night of September 10th/11th with him. The court below held this evidence was not clearly exculpatory because the shooting had occurred during the morning hours of September 10th and, thus, Petitioner's whereabouts and actions that night would not support his alibi, inferring the court's conclusion. However, in a capital murder case, it cannot be conclusively said that the accuracy of

of Petitioner's own testimony in his defense would not have been qualitatively enhanced had it been factually supported by the testimony of witness Archie. Archie refused to testify, asserting his Fifth Amendment privilege after the State had indicated that his testimony might subject him to prosecution for harboring a felon under Section 30-22-4, N.M.S.A. (1978). This subtle coercion by the State could not be overcome by Petitioner since the trial court ruled that he could not apply for an order granting immunity to protect witness Archie in giving this testimony. The restrictive nature of Rule 58 thus fails to guard against abuse of prosecutorial power in subtle intimidation of defense witnesses because no right is extended to the accused to counter the threat of prosecution through grant of immunity for the testimony sought. The right of an accused to develop testimony of his witnesses free from oppressive threat of prosecution has been recognized by this Court. Webb v. Texas, 409 U.S. 95 (1972).

Here, the rule promulgated by the New Mexico Supreme Court unfairly limits the defense right of compulsory process guaranteed by the Sixth Amendment; Washington v. Texas, 388 U.S. 14 (1967), when compared to the power to compel testimony granted to the State. In this case, Petitioner could not offer the testimony of an important witness who would have supported his own testimony, in part. In a capital prosecution, especially, the right to develop a defense through compulsory testimony of witnesses should be zealously guarded. Petitioner's capability of developing his defense was clearly abridged by a rule denying him power to compel testimony which grants the power to the State to do so through the use of immunity orders. The disposition of this issue in the court below is inadequate to resolve the important question of constitutional law raised by this petition.

CONCLUSION

Based on the foregoing points of error, Petitioner prays this Honorable Court issue its writ to review the judgment of the New Mexico Supreme Court.

Respectfully submitted,

J. THOMAS SULLIVAN
Appellate Defender
New Mexico Public Defender Department
215 W. San Francisco Street
Santa Fe, New Mexico 87501
(505)827-3905

ATTORNEY FOR THE PETITIONER

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1983

DAVID LEON CHEADLE,
Petitioner

v. CAUSE NO._____

THE STATE OF NEW MEXICO,
Respondent

APPENDIX

EXHIBIT A: OPINION OF THE NEW MEXICO SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs. No. 14,177

DAVID LEON CHEADLE,

Defendant-Appellant.

SUPREME COURT OF NEW MEXICO
FILED
NOV 21 1983

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Harry E. Stowers, Jr., District Judge

Janet Clow, Chief Public Defender
J. Thomas Sullivan, Appellate Defender
Santa Fe, New Mexico — for Appellant

Leo C. Kelly
Albuquerque, New Mexico — Trial Counsel

Paul Bardacke, Attorney General
Anthony Tupler, Assistant Attorney General
Santa Fe, New Mexico — for Appellee

OPINION

RIORDAN, Justice.

David Leon Cheadle (Cheadle), was convicted of murder in the first degree for which he received a sentence of death. Cheadle was also convicted of kidnapping in the first degree for which he received nineteen years imprisonment, kidnapping in the second degree for which he received ten years imprisonment, two counts of armed robbery in the second degree for which he received ten years imprisonment for each count, and criminal sexual penetration in the second degree for which he received four years imprisonment. Cheadle appeals. We affirm.

The issues on appeal are:

I. Whether the trial court erred in denying Cheadle's motion to strike certain identification testimony.

II. Whether the trial court erred in refusing to grant immunity to a defense witness.

III. Whether the jury instructions used for sentencing were inconsistent and confusing thereby providing inadequate standards for the jury to use in deciding between the death penalty and life imprisonment.

IV. Whether Cheadle is entitled to a new sentencing proceeding because one of the two aggravating circumstances submitted to the jury was not justified by the evidence.

V. Whether Cheadle's sentence of death should be set aside as excessive and/or disproportionate under the circumstances.

VI. Whether New Mexico's Capital Felony Sentencing Act, NMSA 1978, Sections 31-20A-1 through 31-20A-6 (Repl.Pamp.1981), is unconstitutional because the death penalty is cruel and unusual punishment.

Leslie Goodwin (Goodwin) testified that on September 10, 1981, at

approximately 2:15 a.m., she and Gabe Nava (Nava) left Ned's El Portal (Ned's), a bar in Albuquerque, New Mexico. They walked over to Nava's car and stood there in the parking lot talking. Cheadle approached them branishing a gun. Cheadle stated, "Come on let's go,. . . I will kill you if you don't," and then by waving a silver-colored gun instructed them in which direction to proceed. After walking a short distance and stopping between buildings, Cheadle instructed Nava and Goodwin to stand facing the wall of the building in a "spread eagle" position with their backs to Cheadle. Cheadle then demanded money which they both gave to him. Nava was then instructed to take off his jeans and shirt, which he did. Nava and Goodwin were then ordered to move about ten to twelve feet down the alley. They moved to a fence, when again they were ordered to put their hands on the fence and stand in a "spread eagle" position. Cheadle then ordered Goodwin to remove her clothes. At about that time, Cheadle shot Nava for the first time. Cheadle again demanded that Goodwin remove her clothes and told her that he would kill her if she did not. She complied. Cheadle then attempted to rape Goodwin, but could not get an erection. Goodwin was then instructed to put her clothes back on. At that time, Cheadle shot Nava a second time. Cheadle ordered Goodwin back to Nava's car. Upon arriving at Nava's car, Cheadle then got into the front seat and reached over to unlock the driver's door for Goodwin. Goodwin ran and stopped a passing police car, explained what happened and gave a description of the offender to the police.

Nava died later that morning from gunshot wounds to the head.

I. Identification Testimony.

A. Out-of-Court Identification

Cheadle moved to "strike the identification of all the witnesses." The basis of the motion was that the identifications were unreliable because the witnesses had viewed Cheadle's picture furnished to the media by the police before they

made the identification from a photographic lineup or the in-court identification. The trial court denied the motion.

The test with respect to suppression of out-of-court photographic identification is "whether the ' 'photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' '" State v. Nolan, 93 N.M. 472, 476, 601 P.2d 442, 447 (Ct.App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979) (citations omitted.) To determine this, we must decide whether under the "totality of the circumstances" the identification was reliable, even if the confrontation procedure was suggestive. Manson, Correction Commissioner v. Brathwaite, 432 U.S. 98 (1977); State v. Nolan. In Manson, Correction Commissioner v. Brathwaite, the United States Supreme Court set forth five factors to weigh in deciding whether out of court identification was suggestive:

1) The opportunity to view. . . .

2) The degree of attention. . . .

3) The accuracy of the description. . . .

4) The witness' level of certainty. . . .

5) The time between the crime and the confrontation. . . .

Id. at 114 & 115.

Four witnesses were shown a photographic array of five or six pictures which included Cheadle, after Cheadle's picture had been on television and in the newspaper, as the person responsible for Nava's killing.

We will first apply this test to Goodwin. Goodwin testified that she saw Cheadle's face clearly. Goodwin also testified that at times during the incident, she talked directly to Cheadle, face to face, at a distance of inches. Goodwin gave a description of the offender at the scene and later to Officer Putman of the Albuquerque Police Department, before the photographic identification. At the

hospital, Goodwin was shown a photographic array which did not contain Cheadle's picture. Upon viewing the array, Goodwin told the police officer that the assailant was not among the pictures. The day following the incident, after she was released from the hospital, two friends of Goodwin testified that they stopped by Goodwin's home. During a news broadcast, Goodwin saw Cheadle's picture on television. She told her friends, "Oh, my God that's him except he's got an afro in the picture." Goodwin immediately called the police station. Approximately six days later, Goodwin picked Cheadle's picture from a photographic array that contained a picture of Cheadle that was different from the one shown on television. At the trial, Goodwin made a positive in-court identification of Cheadle, as the man that killed Nava and attempted to rape her.

Julie Jones (Jones), a patron at Ned's the night of the incident, also identified Cheadle. Jones testified that Cheadle was sitting at the bar when Jones walked over to the bar to speak to Nava at approximately 1:15 a.m. Cheadle said something to her which she ignored. Jones, a hairdresser, remembers Cheadle particularly because of his slicked back hair style. On September 14, 1981, after seeing a picture of Cheadle on television, Jones picked Cheadle's picture from a photographic array. At trial, Jones positively identified Cheadle as being in Ned's the night of the incident. She also testified that when she picked Cheadle's picture from the photographic array, she was relying only on what she saw at Ned's the evening of the incident.

Ken Gaddis (Gaddis), the manager of Ned's, also identified Cheadle. Gaddis remembers Cheadle coming into Ned's around 1:00 a.m. the night of the incident. Ned's closes at 2:00 a.m., and Gaddis testified that he always starts noticing people around closing time. Gaddis testified that he remembers Cheadle's hair style and his eyes. Between the time of the incident and when he made his identification, Gaddis testified that he saw Cheadle's picture on television and in

the newspapers approximately five times. On September 17, 1981, Gaddis was shown a photographic array which contained a picture of Cheadle different from the pictures shown on and in the media. Gaddis tentatively identified Cheadle from this photographic array. At the time of trial, Gaddis made a positive in-court identification of Cheadle as the person he saw in Ned's the night Nava was killed.

The last witness who identified Cheadle from a photographic array was Robert Mayes (Mayes). At trial, Mayes testified about and identified Cheadle as the person who came to his apartment a few days before the Nava murder, demanded money, and fired three shots at him with a chrome plated automatic pistol. Mayes identified Cheadle from a photographic array after Cheadle's picture appeared in the newspaper; however, he testified that his identification of Cheadle was from his own recognition concerning the night of the shooting at his apartment.

In determining whether there has been a violation of due process in the conduct of a confrontation, we must look to the totality of the circumstances. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct.App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970). After examining the record, we find that the trial court did not err in allowing the out-of-court identification testimony. Manson, Correction Commissioner v. Bruthwaite; State v. Gilliam, 83 N.M. 325, 491 P.2d 1080 (Ct.App.1971).

B. In-Court Identification

In-court identification which is independent of and not tainted by the extra-judicial identification is admissible. State v. Torres. The in-court testimony from the record before us supports the trial court's ruling that it was independent.

Other witnesses who made in-court identifications of Cheadle without being shown photo arrays were: Jim Ewing, who was the doorman at Ned's the night of

the incident, and remembers Cheadle coming in around midnight, showing his and paying the cover charge; and Hal Bereberg, a friend of Jim Ewing, who approached by Cheadle outside Ned's after Ned's had closed.

After a review of the above identification testimony, we find that there no error by the trial court in denying the motion to suppress identificat testimony, and the trial court correctly ruled that the in-court identificat testimony was independent. State v. Aguirre, 84 N.M 376, 503 P.2d 1154 (197 State v. Beachum, 97 N.M. 682, 643 P.2d 246 (Ct.App.1981), cert. quashed, N.M. 51, 644 P.2d 1040 (1982). Once a court finds that the evidence is admissib it becomes a jury determination as to the accuracy of a witness' identificati State v. Ortega, 79 N.M. 744, 449 P.2d 346 (Ct.App.1968).

II. Defense Witness Immunity.

At the close of presentation of the evidence, Cheadle moved to re-open h case, pursuant to NMSA 1978, Crim.P. Rule 40(j) (Repl.Pamp.1980), because defense witness, John Archie (Archie), had been located. The trial court agree to do so. Counsel was appointed for Archie because it appeared that h testimony could incriminate him for harboring a fugitive. NMSA 1978, § 30-22-4.

Outside the presence of the jury, Archie took the stand and indicated that he was called to testify, he would only state his name and address. He would the invoke his Fifth Amendment privilege and refuse to answer questions. At thi time, Cheadle made an offer of proof concerning what Archie would say if he tool the stand, provided he was granted immunity. According to the offer of proof, Archie would testify that Cheadle spent the night of September 10, 1981, at Archie's house, and that the following day, while watching television at Archie's house, he first became aware that the police were looking for him. Therefore, Cheadle requested that the trial court on its own initiative grant Archie immunity. The trial court denied the request.

At the time of Cheadle's trial, New Mexico had two provisions that referred to immunity. NMSA 1978, Section 31-3A-1 (Cum.Supp.1981), applies to grand jury proceedings and is recompiled as Section 31-6-15, NMSA 1978 (Cum.Supp.1983). Section 31-6-15 states:

> If a witness is granted immunity in return for evidence, none of his testimony or any evidence obtained as a fruit of his testimony shall be used against him in any criminal prosecution except that such person may be prosecuted for any perjury committed in such testimony or in producing such evidence, or for contempt for failing to give an answer or produce evidence.

NMSA 1978, Crim.P. Rule 58 (Repl.Pamp.1980), sets forth the procedure for obtaining immunity for a witness. Rule 58 (emphasis added), provides in pertinent part:

> (a) **Issuance of Order.** If a person has been or may be called to testify or to produce a record, document, or other object in an official proceeding conducted under the authority of a court or grand jury, the district court for the judicial district in which the official proceeding is or may be held may, upon the written application of the prosecuting attorney, issue a written order requiring the person to testify or to produce the record, document, or other object notwithstanding his privilege against self-incrimination. . . .

Since there is no constitutional provision or statute in this State allowing application for the granting of immunity to defense witnesses, we must follow the rule of criminal procedure set forth above. State v. Sanchez, 98 N.M. 428, 649 P.2d 496 (Ct.App.), cert. denied, 98 N.M. 478, 649 P.2d 1391 (1982); Campos v. State, 91 N.M. 745, 580 P.2d 966 (1978). Rule 58 requires a written application by the district attorney and a written order by the trial court ordering the person to testify. State v. Sanchez. This order must also contain a specific condition that New Mexico will forego the prosecution of the person for criminal conduct about which he is questioned and testifies. Campos v. State. The law requires the district attorney to undertake that obligation. See NMSA 1978, § 36-1-18(A) annot.

Cheadle made an oral request to the trial court for immunity, there was written application. However, even if Cheadle had complied with Rule 58, the is little precedent for granting defense witnesses immunity. Like New Mexic the federal government allows prosecution witnesses to be immunized but do not have a rule or statute concerning the granting of immunity to defens witnesses. See 18 U.S.C. § 6002, § 6003, § 6005 (1976).

A majority of federal case law has held that the federal district court has n authority to grant immunity or to demand that the government seek immunity fo a defense witness. United States v. Hunter, 672 F.2d 815 (10th Cir.1982); Unite States v. Berrigan, 482 F.2d 171 (3rd Cir.1973).

Cheadle relies on Government of Virgin Islands v. Smith, 615 F.2d 964 (3r Cir.1980), which suggests that under certain circumstances due process ma require that the government afford immunity for a defense witness. The opinio sets forth four rules to follow:

1. The immunity must be properly sought in district court.
2. The defense witness must be available to testify.
3. The testimony must be clearly exculpatory and essential to the defendant's case.
4. There must be no strong government interest which countervails against a grant of immunity.

Id. at 972 - 973 (footnote omitted).

Even if this Court chose to adopt the decision in Goverment of Virgin Islands v. Smith, Cheadle did not comply with the four requirements. The request for immunity was not properly sought. The testimony was not clearly exculpatory and essential. Cheadle's offer of proof showed that Archie would testify that Cheadle slept at his residence the night of September 10, 1981. The murder of Nava was committed in the early morning of September 10, 1981.

However, we decline to follow Government of Virgin Islands v. Smith and

hold that in New Mexico there is no authority to demand immunity for a witness by the defense. See State v. Sanchez.

The trial court properly denied Cheadle's request for granting immunity to Archie.

III. Jury Instruction.

Cheadle claims that the jury instructions, NMSA 1978, UJI Crim. 39.30, 39.31, and 39.33 (Repl.Pamp.1982), were incomplete and confusing, thereby providing the jury with inadequate objective standards for weighing their decision as to whether death or life imprisonment was appropriate.

At the instructions' conference, the trial court asked both the State and Cheadle whether there were any objections to the proposed instructions to be given to the jury in the sentencing phase. Cheadle made no objections. On appeal, Cheadle, for the first time, objected to the giving of the three jury instructions.

We have repeatedly held that absent fundamental error that is jurisdictional, objections to jury instructions cannot be raised for the first time on appeal when the defendant did not object to the instructions at trial. State v. Garcia, 99 N.M. 771, 664 P.2d 969, cert. denied, ___ U.S. ___, 103 S.Ct. 2464, ___ L.Ed2d ___ (1983); State v. Noble, 90 N.M. 360, 563 P.2d 1153 (1977). We still adhere to this procedure in death penalty cases. State v. Garcia; see Vaught v. State, 410 So.2d 147 (Fla.1982).

We point out that in State v. Garcia, we reviewed two of the challenged instructions and found no fault with them. We also point out that the United States Supreme Court has recently held that there is no requirement that a state adopt specific standards for the weighing process in deciding whether to impose the death penalty. In Zant v. Stephens, ___ U.S. ___, 103 S.Ct. ___, 77 L.Ed.2d 235, 258 (1983) (citations omitted) (emphasis added), the United States Supreme

Court stated that:

> [W]e note that in deciding this case we do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty. . . . [T]he Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances. . . .

Therefore, although New Mexico has adopted the standard that a defendant cannot be sentenced to death if the mitigating circumstances outweigh the aggravating circumstances, the Constitution does not require the adoption of a specific standard for instructing the jury in its consideration of aggravating and mitigating circumstances.

IV. Aggravating Circumstances.

Cheadle was charged with two aggravating circumstances. N.M.S.A. 1978, §§ 31-20A-5(B) and (G) (Repl.Pamp.1981). Both aggravating circumstances were submitted to the jury. The jury unanimously found beyond a reasonable doubt that aggravating circumstance Section 31-20A-5(B) existed and that Cheadle should be sentenced to death. The jury also unanimously found beyond a reasonable doubt that aggravating circumstance Section 31-20A-5(G) existed and that Cheadle should be sentenced to death for that crime also.

Cheadle does not dispute that there was sufficient evidence to sustain the submission of Section 31-20A-5(B) to the jury. Section 31-20A-5(B) provides that:

> [T]he murder was committed with intent to kill in the commission of or attempt to commit kidnaping, criminal sexual contact of a minor or criminal sexual penetration.

Cheadle does assert that aggravating circumstance Section 31-20A-5(G) was not justified by the evidence; therefore, he should be granted a new sentencing proceeding. Section 31-20A-5(G) provides that:

> [T]he capital felony was murder of a witness to a crime or any person likely to become a witness to a crime, for the purpose of preventing report of the crime or testimony in any criminal proceeding, or for retaliation for the victim having testified in any criminal proceeding.

The jury was instructed on "murder of a witness" as follows:

> Before you may find the aggravating circumstance of murder of a witness to a crime or a person likely to become a witness to a crime, you must find that the state has proved to your satisfaction beyond a reasonable doubt each of the following elements:
>
> 1. Gabe Nava was a witness to a crime or likely to become a witness to a crime; and
>
> 2. Gabe Nava was murdered to prevent Gabe Nava from reporting the crime.

Accord, NMSA 1978, UJI Crim. 39.20 (Repl.Pamp.1981).

Cheadle raises this objection for the first time on appeal. Objections to jury instructions cannot be raised for the first time on appeal. State v. Garcia; Vaught v. State. Therefore, since this objection was not raised at the trial court level, Cheadle is precluded from raising it now. However, even if he were correct, when two or more aggravating circumstances are found, the invalidation of one will not invalidate the sentencing proceeding unless the invalidation is due to constitutionally protected conduct. Zant v. Stephens.

V. Proportionality Review.

A deeply rooted principle is that a punishment should be proportionate to the crime. Solem v. Helm, ___ U.S. ___, 103 S.Ct. ___, 77 L.Ed2d 637 (1983). If not, then the punishment is considered cruel and unusual in violation of the United States and New Mexico Constitutions. U.S. Const. amend. VIII and XIV; N.M. Const. art. II, § 13. Gregg v. Georgia, 428 U.S. 153 (1976), held that the imposition of the death penalty for a deliberate murder is neither the purposeless imposition of severe punishment nor punishment grossly disproportionate for the crime.

Under New Mexico's Capital Felony Sentencing Act, Section 31-20A-4(C), we are to review the sentence of death to determine if it is "excessive or disproportionate to the penalty imposed in similiar cases, considering both the crime and the defendant." In State v. Garcia ___ N.M. at ___, 664 P.2d at 978 (1982), we set up guidelines for such review.

These guidelines are to apply prospectively to cases that were decided in any court within New Mexico after the mandate in State v. Garcia. Because Cheadle's case was already before this Court when State v. Garcia was decided, we contacted the State and the defense requesting their submission of cases for comparisons. Two cases have been brought to our attention. State v. Hutchinson, 99 N.M. 616, 661 P.2d 1315 (1983), and State v. Garrison, No. 14,313. We will also consider the recently decided cases of State v. Simonson, 22 SBB 1125 (1983), and State v. Gilbert, 22 SBB 1173 (1983).

In State v. Hutchinson, the defendant was charged with aggravating circumstances Section 31-20A-5(B) and (G). The jury found both aggravating circumstances existed, but did not impose the death sentence. Hutchinson was convicted of first degree murder for which he received life imprisonment, of first degree kidnapping for which he received eighteen years imprisonment, and of armed robbery for which he received nine years imprisonment.

Cheadle urges us to also compare State v. Garrison, No. 14,313, which was disposed of by unpublished decision. Garrison was charged with one aggravating circumstance. § 31-20A-5(G). The jury did not find that this aggravating circumstance existed. Therefore, pursuant to our standard in State v. Garcia, State v. Garrison is not to be compared and is not applicable to this analysis.

In State v. Simonson, aggravating circumstance Section 31-20A-5(G) was given for two separate murders. The jury found that each aggravating circumstance existed but after weighing the mitigating and aggravating

circumstances and considering the defendant and the crime, the jury did not impose the death penalty. Simonson was convicted of two counts of first degree murder for which he received two life sentences, and he was also convicted of attempted murder for which he received nine years.

In State v. Gilbert, aggravating circumstance Section 31-20A-5(B) was given for two separate murders. Section 31-20A-5(G) was also given. The jury found that all three aggravating circumstances existed and unanimously voted to impose the death penalty. Gilbert's death penalty was recently upheld. State v. Gilbert.

Proportionality review in New Mexico is first and foremost directed to the particular circumstances of a crime and the specific character of the defendant. State v. Garcia. It is our duty to review the determination by the jury; we will not retry the case for what may be a better result. Id.

We have compared the sentences imposed in Hutchinson, Simonson and Gilbert to see if Cheadle's sentence is excessive or disproportionate. The facts, circumstances and crimes in each case are different, as well as the defendants and their histories. After a thorough review of the record and transcripts in Cheadle's trial, we find that Cheadle's sentence of death for the deliberate murder of Nava is neither excessive nor disproportionate.

VI. Death Penalty.

Cheadle contends that the death penalty constitutes cruel and unusual punishment under the United States' and New Mexico's Constitutions. U.S. Const. amend. VIII and XIV; N.M. Const., art. II, § 13.[1]

In State v. Garcia, we held that pursuant to Gregg v. Georgia, 428 U.S. 153 (1976), the punishment of death does not violate the United States Constitution. We also held in State v. Garcia, that pursuant to State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976), the death penalty is not cruel and unusual punishment per se within the prohibition of the Eighth and Fourteenth Amendment of the United

States Constitution or Article II, Section 13 of New Mexico's Constitution. New Mexico's current capital punishment statutes, Sections 31-20A-1 through 31-20A-6, are modeled after Florida's, Georgia's and Texas'[2] death penalty statutes, which havewithstood United States Supreme Court scrutiny.[3] Therefore, we again find that New Mexico's Capital Felony Sentencing Act is constitutional.

VII. Conclusion.

After having carefully reviewed the record and transcript in the case before us, we conclude that there was no error committed on the issues presented in this case and that the death sentence was validly imposed. Therefore, the judgment of the jury that Cheadle be punished by death is affirmed. This case is remanded to the trial court to set the date of execution, not less than sixty days nor more than ninety days from the issuance of the mandate on our judgment.

IT IS SO ORDERED.

WILLIAM RIORDAN, Justice

We Concur:

H. VERN PAYNE, Chief Justice

WILLIAM R. FEDERICI, Justice

DAN SOSA, JR., Senior Justice, Dissenting in Part.

HARRY E. STOWERS, JR., Not Participating.

FOOTNOTES

1. Robinson v. California, 370 U.S. 660 (1962), held that the Eighth Amendment to the United States Constitution was applicable to the states through the Fourteenth Amendment to the United States Constitution.

2. Fla. Stat. § 921.141 (1981); Ga. Code Ann. § 27-2534.1 and § 27-2537 (Cum.Supp.1982); Texas Stat. Ann. art. 37.071 (Vernon 1981).

3. Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

SPECIAL CONCURRANCE

SOSA, Senior Justice, specially concurring.

I concur with the affirmance of the convictions in this case for the reasons stated in the majority opinion. I respectfully dissent on the issue of the imposition of the death penalty. I would hold that the Capital Felony Sentencing Act, NMSA 1978, Sections 31-20A-1 through 31-20A-6 (Repl.Pamp.1981) violates the Fourteenth and Eighth Amendments to the U.S. Constitution and Article II, Sections 13 and 18 of the N.M. Constitution. Initially, the relevant Uniform Jury Instructions do not provide clear and objective standards to guide the jury's sentencing decision. While the defendant and the crime may only be considered in mitigation, and not in aggravation, the jury is not instructed to this effect. This belies the fact that no effective guidance is provided the jury in its determination whether aggravating circumstances outweigh mitigating circumstances. In addition, the New Mexico death penalty provisions do not provide for meaningful proportionality review as is evidenced by the cursory discussion in the majority opinion comparing the circumstances, crimes, defendant's history and sentences in the instant case with those of other cases. Finally, both the Uniform Jury Instructions and the sentencing statute allow for unequal treatment of equally culpable defendants. For these reasons, which I discuss in greater detail in my specially concurring opinion in State v. Garcia, ____ N.M. ____, 664 P.2d 969, cert. denied, ____ U.S. ____, 103 S.Ct. 2464 (1983), I would remand this cause for the imposition of a sentence of life imprisonment.

DAN SOSA, JR., Senior Justice

EXHIBIT B: PETITIONER'S MOTION FOR REHEARING IN THE NEW MEXICO SUPREME COURT

filed
11/30/83

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee

v. NO. 14,177

DAVID LEON CHEADLE,

Defendant-Appellant

CRIMINAL APPEAL FROM

THE DISTRICT COURT OF BERNALILLO COUNTY

HONORABLE HARRY E. STOWERS, JR., DISTRICT JUDGE

DEFENDANT-APPELLANT'S MOTION FOR REHEARING

JANET CLOW
Chief Public Defender

J. THOMAS SULLIVAN
Appellate Defender
Public Defender Department
Appellate Division
215 W. San Francisco Street
Santa Fe, New Mexico 87501
(505)827-3905

ATTORNEYS FOR DEFENDANT-APPELLANT

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee

v. NO. 14,177

DAVID LEON CHEADLE,

Defendant-Appellant

MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT:

This motion is brought by DAVID LEON CHEADLE, Defendant, by and through his attorney of record on appeal, J. THOMAS SULLIVAN, Appellate Defender, and counsel of record for Defendant. Defendant moves this Honorable Court grant rehearing based on the following:

I.

The Court misapprehended the [illegible] claim of error on appeal, relating to lack of evidentiary justification for the jury's finding that Defendant committed murder of a witness, in holding that this issue was improperly preserved. The Court held, at page 11 of the slip opinion, that:

> "Cheadle raises this objection for the first time on appeal. Objections to jury instructions cannot be raised for the first time on appeal. State v. Garcia; Vaught v. State. Therefore, since this objection was not raised at the trial court level, Cheadle is precluded from raising it now." (emphasis in original)

The point of error, as drafted and argued, is not an objection to the instruction given. Rather, it related to evidentiary sufficiency and Defendant contends that this matter could properly be raised for the first time on appeal. See State v. Doe, 583 P.2d 464 (1978).

II.

Defendant second challenges the Court's further disposition

of this point of error on appeal:

> "...However, even if he were correct, when two or more aggravating circumstances are found, the invalidation of one will not invalidate the sentencing proceeding unless the invalidation is due to constitutionally protected conduct. Zant v. Stephens."

Slip opinion, at 11. Defendant contends that the Court misapprehends the legal basis for the holding in Zant v. Stephens, ___U.S. ___, 103 S.Ct. 2733 (1983). Defendant did not argue that the aggravating circumstance, as defined by statute, is constitutionally invalid; rather, he simply argued that the evidence was insufficient to demonstrate that the motivation for the murder was to kill the deceased because he was a witness. Thus, Defendant argues that the Court should reconsider its original assessment of the point of error and simply review the evidence for sufficiency. Moreover, Defendant contends that the Court's view of Zant is incorrect when applied to the New Mexico statute. See 103 S.Ct. at 2741, especially fn. 12.

CONCLUSION

Upon consideration of this motion, Defendant moves the Court grant rehearing in this cause and re-address point four as raised in his brief in chief to review the sufficiency of the evidence offered to prove that the killing of a witness was the motivation for the murder in this case.

Respectfully submitted,

JANET CLOW
Chief Public Defender

J. THOMAS SULLIVAN
Appellate Defender
Public Defender Department
Appellate Division
[illegible] Francisco Street
Santa Fe, New Mexico 87501
(505) 827-[illegible]

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the fore going Motion for Rehearing was served upon the Attorney General by hand delivery to the AG's box in the Supreme Court on this 30th day of November, 1983.

PUBLIC DEFENDER DEPARTMENT

EXHIBIT C: ORDER OF THE NEW MEXICO SUPREME COURT DENYING REHEARING.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Wednesday, December 21, 1983

NO. 14,177

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

DAVID LEON CHEADLE,

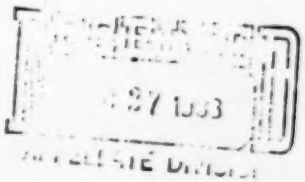
Defendant-Appellant.

This matter coming on for consideration by the Court upon Motion of Appellant for a Rehearing, and the Court having considered said motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that Motion of Appellant for rehearing is hereby denied.

ATTEST: A TRUE COPY

Clerk of the Supreme Court
of the State of New Mexico



RECEIVED
FEB 23 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

DAVID LEON CHEADLE,

Petitioner,

vs.

No 83-6141

STATE OF NEW MEXICO,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The undersigned attorney, on behalf of the petitioner in this case, hereby moves that Petitioner be allowed to proceed in forma pauperis before this Court. The reasons are set forth in the attached affidavit.

Respectfully submitted,

J. THOMAS SULLIVAN
Appellate Defender

New Mexico Public Defender Department
Appellate Division
215 West San Francisco Street
Santa Fe, New Mexico 87501
(505) 827-3905

Counsel for Petitioner

RECEIVED
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83-6141

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1983

AFFIDAVIT SUPPORTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF NEW MEXICO)
)
COUNTY OF SANTA FE)

I, DAVID LEON CHEADLE, being first duly sworn, depose and say that I am the Petitioner in CHEADLE V. STATE OF NEW MEXICO; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this proceeding or to give security therefor and I believe that I am entitled to legal redress.

I further swear to the following:

1). I am presently incarcerated in the New Mexico State Penitentiary under sentence of death and have been incarcerated at all times since my arrest for the charge upon which I was convicted;

2). I have no current employment, source of income or savings with which to pay the costs of this appeal;

3). At all times during the course of the trial and appeal in the New Mexico courts I have been declared indigent and represented by the New Mexico Public Defender Department or counsel paid by the New Mexico Public Defender Department on contract basis. My appeal is currently being prosecuted by the Appellate Division of the New Mexico Public Defender Department;

4). I have no personal or real property which might be converted to pay the costs of appeal in this case;

5). I have no resources to support any person other than myself and do not provide support for anyone else.

I understand that a false statement in this affidavit will subject me to penalty for perjury.

David L. Cheadle
DAVID LEON CHEADLE, AFFIANT

SUBSCRIBED AND SWORN TO before me, the undersigned authority, this 16 day of February, 1984.

Richard A. Valdez
NOTARY PUBLIC,
STATE OF NEW MEXICO

MY COMMISSION EXPIRES NOVEMBER 29, 1984

Supreme Court, U.S.
FILED
MAR 19 1984
ALEXANDER L. STEVAS
CLERK

NO. 83-6141

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

DAVID LEON CHEADLE

Petitioner

V.

THE STATE OF NEW MEXICO

Respondent.

On Petition For Writ of Certiorari
To The Supreme Court of New Mexico

RESPONDENT'S BRIEF IN OPPOSITION

PAUL BARDACKE
Attorney General of New Mexico

ANTHONY TUPLER
Assistant Attorney General

Post Office Drawer 1508
Santa Fe, New Mexico 87504-1508
(505) 827-6929

Attorneys for Respondent

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TABLE OF AUTHORITIES

Supreme Court Cases Cited:

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Proffitt v. Florida, 428 U.S. 243, 257-258, 96 S.Ct. 2960, 49 L.Ed.2d 913, 926 (1976)	6,7
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Cases From Other Jurisdictions:

Government of Virgin Islands v. Smith, 615 F.2d 964 (3rd Cir. 1980)..... 10

State v. Wood, 648 P.2d 71, 83 (Utah 1982)..... 6

U.S. v. Hunter, 672 F. 815 (10th Cir. 1982)..... 9

Rules and Statutes Cited:

Rule 17, Supreme Court Rules..... 4,10

Section 31-20A-2B, NMSA 1978..... 3,6

Other Authorities Cited:

N.M.U.J.I. Criminal 39.31..... 5

N.M.U.J.I. Criminal 39.33..... 3

PRELIMINARY STATEMENT

Respondent State of New Mexico pursuant to Supreme Court Rule 34.2, does not deem a statement of the case nor the noted exceptions in the foregoing rule necessary for inclusion in this Brief in Opposition. Petitioner adequately sets out those matters required by Supreme Court Rule 34.1.

SUMMARY OF ARGUMENTS

POINT I: Respondent concedes the decision challenged here does not directly resolve Petitioner's claim of insufficient evidence to support the aggravating circumstance of murder of a witness. Petitioner did not challenge the sufficiency of the other aggravating circumstance found by the jury. Irrespective of Zant v. Stephens, 103 S.Ct. 2733 (1983) and its application by the New Mexico Supreme Court on this issue, Barclay v. Florida, 103 S.Ct. 3418 (1983) answers Petitioner's claim.

Alternatively, this Court may deem it appropriate to remand this issue to the New Mexico Supreme Court for resolution of the evidentiary sufficiency of the aggravating circumstance of murder of a witness and application of the Barclay decision. Respondent does not believe such remand is necessary.

POINT II: The issue of appropriate standards to limit the consideration of the phrase, "the defendant and the crime", has been previously addressed by the Court and requires no further review. Petitioner did not challenge the applicable New Mexico death penalty statute in the state supreme court. Petitioner did not challenge the instruction utilizing the above phrase in the trial court instruction.

POINT III: There is no constitutional requirement to instruct the jury that aggravating circumstances must outweigh mitigating circumstances beyond a reasonable doubt. Petitioner did not raise this claim against the applicable New Mexico statute on direct appeal. Petitioner did not challenge the jury instruction on the weighing process at the instruction conference in the trial court.

POINT IV: The factual context of the proffered defense testimony sought to be immunized was irrelevant in time to that when the offenses were committed. The New Mexico Supreme Court correctly held Petitioner was not denied any constitutional right to present a defense or call witnesses on his behalf by the trial court's refusal to force immunity on his proffered witness. Petitioner did not correctly seek to have his proffered witness immunized.

ARGUMENT

POINT I

Petitioner alleges twofold error by the New Mexico Supreme Court in deciding the issue of sufficient evidence to support one of two aggravating circumstances submitted to the jury. First he alleges the New Mexico Supreme Court deprived him of appellate review by failing to review his sufficiency claim that the aggravating circumstance of murder of a witness was not proven beyond a reasonable doubt. Secondly, that the New Mexico Supreme Court has misconstrued the holding in Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). (Pet. 8-11).

Respondent New Mexico answers that two grounds suffice to deny review of these contentions. First, this Court extended Zant v. Stephens, in Barclay v. Florida, __ U.S. ___, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983) by holding that the consideration of an invalid aggravating circumstance does not render a death sentence constitutionally infirm if otherwise supported by another valid aggravating circumstance(s). Secondly, assuming the New Mexico Supreme Court misconstrued Zant, Barclay is dispositive authority supportive of that Court's decision.

Alternatively, if this Court deems review on the merits of Petitioner's sufficiency claim essential, the Court may remand the decision to the New Mexico Supreme Court for such review and application of Barclay.

Assuming the evidence is insufficient to support the murder of a witness circumstance, Barclay v. Florida, supra would still render the Cheadle opinion to be correctly decided. Whether the New Mexico Supreme Court correctly applied Zant v. Stephens, supra would be irrelevant.

Respondent New Mexico concedes that the New Mexico Supreme Court did not expressly decide his claim of insufficient evidence

to support of one of two aggravating circumstances. Hence, irrespective of the correctness of the New Mexico Supreme Court's interpretation of Zant v. Stephens, supra, this Court may desire to remand this issue to the New Mexico Supreme Court to decide the merits of evidence sufficiency for the aggravating circumstance of murder of a witness. However, remand is unnecessary in view of the holding in Barclay v. Florida, supra. Pending disposition of this issue by the New Mexico Supreme Court, if necessary, there is no basis upon which this Court needs to review the correctness of the New Mexico Supreme Court's interpretation of Zant v. Stephens, supra, in light of Barclay v. Florida, supra.

POINT II

Petitioner asserts the New Mexico Death Penalty Statute is constitutionally infirm for failure to set appropriate standards for jury consideration of the phrase "the Defendant and the crime" in deciding the appropriate sentence. (Petition, 12-15).

This question does not warrant review by this Court. The issue has been adequately addressed by previous decisions and does not need further review. Secondly, Petitioner challenges the New Mexico Death Penalty Statute too late. He did not raise this issue in the New Mexico Supreme Court.

Petitioner admits he did not raise any objection to the phrase "the Defendant and the crime" in the instruction given in the trial court. He further concedes the New Mexico Supreme Court held the issue waived by failure to object. (Pet., 12). Petitioner then changes course and "suggests" that the New Mexico Supreme Court erred in applying a rule of waiver because the attack was "essentially" on the constitutionality of an unspecified statute upon which the instruction was predicated. Respondent assumes the statute to be §31-20A-2B, NMSA 1978. (Appendix A) This contention is clearly incorrect. Petitioner did not attack the constitutionality of any statute upon which the challenged instruction was based on direct appeal.

In the New Mexico Supreme Court, Petitioner challenged N.M.U.J.I. Criminal 39.33, claiming the instruction did not provide clear and objective standards which are rationally reviewable because (1) it instructed the jury to simply weigh aggravation against mitigation without further guidance and (2) its final standard -- "the Defendant and the crime" -- is one of sheer subjectivity. The New Mexico Supreme Court noted that Petitioner raised no objection in the trial court to the instruction challenged on appeal. (Pet.App. Exhibit A, 9-10).

This Court does not generally review claims not raised below. Hankerson v. North Carolina, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977). There was no issue raised that the New Mexico Capital Felony Act was unconstitutional upon the grounds asserted for the first time in this Court. The failure to raise the statutory contention in the New Mexico Supreme Court forecloses the propriety of any review by this Court. Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 643 (1974).

The matter is inappropriate for review by this Court. Rule 17, Supreme Court Rules.

POINT III

Petitioner next argues the New Mexico Capital Felony Act and the implementing jury instructions are unconstitutional. This is premised upon the assertion that there is no requirement that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. (Pet., 16-18).

Respondent New Mexico answers that there is no constitutional requirement that aggravation outweigh mitigation beyond a reasonable doubt. Secondly, Petitioner did not raise this issue with respect to the applicable New Mexico statute. Finally, Petitioner did not challenge the appliable instruction at the trial court instruction conference prior to submission to the jury.

Petitioner correctly notes this Court's decision in Zant v. Stephens, __ U.S. ___, 103 S. Ct., 2733, 77 L.Ed.2d 235 (1983), holding there is no constitutional requirement for specific weighing standards to guide the jury's consideration of mitigation against aggravation. He contends the New Mexico Supreme Court's reliance on Zant v. Stephens is misplaced. The decisional rationale in Zant v. Stephens is dispositive of his claim here and it does not merit further review by this Court.

The relationship between aggravation and mitigation is clearly and fundamentally simple. The instruction, N.M.U.J.I. Crim. 39.31, provides that the State must prove beyond a reasonable doubt that the mitigating circumstances do not outweigh the aggravating circumstances. To the extent that this may involve proof of a negative proposition, Respondent submits that the application of simple logic resolves any purported ambiguities or uncertainties. To state the standard positively, the jury must find that the aggravating circumstances are equal to or outweigh the mitigating circumstances. Assuming equality

of weight between aggravation and mitigation, the jury's decisional process must then consider two other factors: the defendant and the crime. Section 31-20A-2.B NMSA (1978); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Eddings v. Oklahoma, U.S. 102 S.Ct. 869, 70 L.Ed.2d 1 (1982). How such a process fails to adequately channel the jury's discretion is not made clear by Petitioner.

In any event, this issue was answered in Proffitt v. Florida, 428 U.S. 242, 257-258, 96 S.Ct. 2960, 49 L.Ed.2d 913, 926 (1976), wherein this Court opined:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

The principle enunciated in Proffitt answers the claim made now.

To the extent that Petitioner contends State v. Wood, 648 P.2d 71, 83 (Utah 1982), constitutes support for his argument, he is mistaken. The Utah Supreme Court in Wood considered a statute which contained no burden of proof to either the existence of an aggravating circumstance or the balance of proof between aggravating and mitigating circumstances. The Wood court concern was the statute not only failed to assign any weight necessary to find the existence of an aggravating factor but even omitted directions to the jury to compare aggravating and mitigating factors. As the Wood court noted, "the sentencing authority is simply directed by Section 76-3-2072 to 'consider the penalty'." 648 P.2d at 79.

The similar Georgia statute considered and upheld by this Court in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d

859 (1976) undermines any persuasive force State v. Wood, supra, might otherwise have. The Georgia statute and the Utah statute are sufficiently similar to negate any value of the Wood opinion.

The decisions in Proffitt, Gregg, and Stephens dispositively answer the contentions presented by petitioner. The issue does not merit review by this Court. Rule 17 Supreme Court rules.

Secondly, Petitioner did not challenge the New Mexico death penalty statute on the grounds now asserted here. He only attacked the insufficiency of the instructions on direct appeal to the New Mexico Supreme Court. (Pet.App. Exhibit A, 9-10; Brief-in-chief, 18-22). This Court will not consider a State statute challenge in the first instance. Fuller v. Oregon, supra.

Finally, Petitioner did not object to any of the instructions at the instruction conference. (Pet.App. Exhibit A, 9-10). This Court generally declines to consider instructional issues not raised in the trial court. Hankerson v. North Carolina, supra.

POINT IV

Petitioner asserts New Mexico Rule of Criminal Procedure 58 extends only to the state the right to seek immunity to compel testimony from a reluctant witness who invokes the 5th Amendment privilege. This is argued to be unconstitutional because it deprives an accused of a similar "right". (Pet. 19-22).

Respondent replies that the decision below gave full consideration to the issue and decided it correctly. Secondly, irrespective of whether the decision below was correct, Petitioner's argument is without merit.

The challenged decision reflects the dispositive basis upon which this Court should decline to further review the matter raised. The evidence in the case conclusively established that the murder of the victim and the attempted rape and kidnapping of another victim occurred during the early morning hours of September 10, 1981. The witness sought to be immunized would have testified that Petitioner slept at his residence on the evening of September 10, 1981.

The suggestion by Petitioner that had his desired witness been immunized, his proferred testimony would have supported, in part, Petitioner's alibi belies the uncontroverted evidence that the offenses occurred numerous hours before this witness could offer any evidence of alibi. As a factual matter, Defendant demonstrates no constitutional violation. For this reason alone, the issue should not be reviewed by this Court.

Petitioner further asserts that because of the limit of Rule 58, his failure to properly proceed in accordance with the rule should be excused because his disentitlement to its benefits rendered compliance futile. He cites no authority to excuse his failure. The Cheadle opinion correctly held that petitioner

failed to properly attempt to immunize his desired witness. (Pet.App. Exhibit A, 6-9).

Moreover, the New Mexico Supreme Court correctly resolved this issue against Petitioner on the basis of the majority rule in the federal circuits concerning the immunity issue.

In summary, those cases have held that immunity is an executive function, not a judicial one. Immunity is a statutory creature and not inherent under the constitutional provisions relied upon by various defendants in those cases. U.S. v. Hunter, 672 F. 815 (10th Cir. 1982); United States v. Turkish, 623 F. 769, 771-779 (2nd Cir. 1980), cert. denied, 101 S.Ct. 856 (1981).

Turkish also analyzed the question of immunity in another light. The Court observed that a criminal prosecution was not, in any sense, a symmetrical proceeding. The prosecution and defense come to trial with substantially different positions. The prosecution necessarily assumes substantial constitutional obligations to establish the defendant's guilt. The defendant has no constitutional obligations. The Turkish court fairly noted the substantial differences in resources.

Nevertheless, that court declined to follow any kind of an equalization theory because of the disparity in investigatory and evidentiary resources. The bottom line analysis of the numerous federal decisions may be characterized in brief as reflecting the important policy considerations to society. The government or state prosecutorial arms must necessarily be afforded the leeway to determine the potential harm of either prosecuting offenders or immunizing potential offenders in order to more effectively prosecute the more dangerous offenders. On the other hand, an accused has only one basic interest: acquittal.

The bottom line principle was also recognized by the only federal case petitioner relies upon. Government of Virgin

Islands v. Smith, 615 F. 2d 964 (3rd Cir. 1980). As correctly observed by the New Mexico Supreme Court, Petitioner did not even meet the requirements set forth in Smith by which to obtain immunity for his potential witness. (Pet.App. Exhibit A, 6-9).

As noted above, the testimony sought to be immunized was not clearly exculpatory or essential to Petitioner's case. The immunity was not correctly sought in the trial court. Finally, Petitioner made no showing that there was an absence of a strong governmental interest which counterveiled against the grant of immunity. Petitioner does not demonstrate that his failure to follow the requirements of the Smith criteria is excusable. This issue does not have a proper factual basis upon which it can be further reviewed.

There is no adequate reason for this Court to review the issue raised. Rule 17, Supreme Court Rules.

CONCLUSION

For the reasons presented, Respondent State of New Mexico respectfully submits that the Petition for Certiorari should be denied.

Alternatively, if the Court deems sufficiency review of the aggravating circumstance of murder of a witness necessary, it should grant the writ and remand the issue to the New Mexico Supreme Court for resolution.

Respectfully submitted,

PAUL BARDACKE
Attorney General

ANTHONY TUPLER
Assistant Attorney General

Attorneys for Respondent
State of New Mexico
Post Office Drawer 1508
Santa Fe, New Mexico 87504-1508
(505) 827-6929

ARTICLE 20A

Capital Felony Sentencing

Sec.
31-20A-1. Capital felony; sentencing procedure.
31-20A-2. Determination of sentence.
31-20A-3. Court sentencing.
31-20A-4. Review of judgment and sentence.
31-20A-5. Aggravating circumstances.
31-20A-6. Mitigating circumstances.

31-20A-1. Capital felony; sentencing procedure.

A. At the conclusion of all capital felony cases heard by jury, and after proper charge from the court and argument of counsel, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In nonjury capital felony cases, the judge shall first consider a finding of guilty or not guilty without any consideration of punishment.

B. Upon a verdict by the jury or judge that the defendant is guilty of a capital felony, or upon a plea of guilty to a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized herein. In a jury trial, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge before the original trial jury. In a nonjury trial the sentencing proceeding shall be conducted as soon as practicable by the original trial judge. In the case of a plea of guilty to a capital felony, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge or by a jury upon demand of a party.

C. In the sentencing proceeding, all evidence admitted at the trial shall be considered and additional evidence may be presented as to the circumstances of the crime and as to any aggravating or mitigating circumstances pursuant to Sections 6 [31-20A-5 NMSA 1978] and 7 [31-20A-6 NMSA 1978] of this act.

D. In a jury sentencing proceeding, the judge shall give appropriate instructions and allow argument and the jury shall retire to determine the punishment to be imposed. In a nonjury sentencing proceeding, or upon a plea of guilty, where no jury has been demanded, the judge shall allow argument and determine the punishment to be imposed.

History: Laws 1979, ch. 150, § 2.

31-20A-2. Determination of sentence.

A. Capital sentencing deliberations shall be guided by the following considerations:

(1) whether aggravating circumstances exist as enumerated in Section 6 [31-20A-5 NMSA 1978] of this act;

(2) whether mitigating circumstances exist as enumerated in Section 7 [31-20A-6 NMSA 1978] of this act; and

(3) whether other mitigating circumstances exist.

B. After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, the jury or judge shall determine whether the defendant should be sentenced to death or life imprisonment.

History: Laws 1979, ch. 150, § 3.

31-20A-3. Court sentencing.

In a jury sentencing proceeding in which the jury unanimously finds beyond a reasonable doubt and specifies at least one of the aggravating circumstances enumerated in Section 6 [31-20A-5 NMSA 1978] of this act, and unanimously specifies the sentence of death pursuant to Section 3 [31-20A-2 NMSA 1978] of this act, the court shall sentence the defendant to death. Where a sentence of death is not unanimously specified, or the jury does

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